



Nobel Trading Company Limited & another v Opondo (Civil Appeal E105 of 2020) [2024] KEHC 8860 (KLR) (Appeals) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
APPEALS**

CIVIL APPEAL E105 OF 2020

AB MWAMUYE, J

JUNE 27, 2024

BETWEEN

NOBEL TRADING COMPANY LIMITED 1ST APPELLANT

LEWIS NJENGA 2ND APPELLANT

AND

ANTHONY OPONDO RESPONDENT

(Being an Appeal against the Judgment and Decree of the Hon. A. N. Makau (SPM) delivered on 6th February, 2020 in Milimani CMCC No. 3258 of 2018)

JUDGMENT

1. The Appellants herein are challenging the Trial Court’s findings on both liability and quantum; and they are aggrieved with the Trial Court for apportioning 100% liability to the Appellants and also the Trial Court’s decision of awarding the Respondent herein Kshs.1,000,000.00 as general damages for pain, suffering, and loss of amenities.
 1. The Parties filed and exchanged written submission. The Appellants’ Written Submissions dated 22nd April, 2024 and the Respondent’s Written Submissions dated 11th April, 2024 are in agreement that the three issues for determination in this Appeal are as follows:
 - a. Whether the Trial Court erred in its findings on liability;
 - b. Whether the Trial Court erred in its findings on general damages; and
 - c. Who should bear the costs of the Appeal?



2. On the issue of liability, the Appellant's have cited numerous authorities in their written submissions in support of their contention that the Trial Court acted without any legal or evidential justification and thus erred both in law and in fact by apportioning 100% liability against the Appellants. They do so having faulted the Trial Magistrate for in their view not taking into consideration that the Respondent, as the Plaintiff before the Trial Court, had failed to provide conclusive proof of liability.
3. The Appellants also contend that the Learned Magistrate erred in law and in fact by not considering the following that:
 - a. PW1's testimony was not corroborated by any other person;
 - b. PW1 conceded that he was not using the pavement at the time of the accident rather he was on the right side of the road;
 - c. PW2 conceded that he was not the Investigating Officer and he was not sure who the Investigating Officer was;
 - d. PW2 produced a Police Abstract that did not blame the Appellants;
 - e. PW2 did not produce a sketch plan showing where and how the accident occurred;
 - f. PW2 confirmed that the accident was still under investigation at the time of the filing of the suit; and
 - g. There was no legal basis to shift the burden of proof from the Respondent to the Appellants, as the Respondent had not discharged his obligation to establish a basis for doing so based on evidence produced.
4. From the authorities cited by the Appellants, they are seeking a reduction in the quantum of general damages from Kshs.1,000,000.00 to between Kshs.400,000.00 and Kshs.500,000.00.
5. The Respondent's Written Submissions cite the decisions of the High Court in *Mary Njeri Murigi v Peter Macharia and Anor*, [2016] eKLR and *Juma v Rabote*, [2023] KEHC 2909 (KLR) in support of his position that the mere occurrence of a vehicular accident is proof of negligence unless rebutted, which the Appellant's failed to do. The Respondent then proceeded to cite authorities where similar injuries had attracted higher awards of damages than that set by the Trial Court; a position that argues that the Trial Court was in actual fact lenient on the Appellants and thus this Court should not interfere with the lower court's award.
6. In re-examining the evidence tendered before the Trial Court and after considering the testimonies of the Parties as recorded in the proceedings, I find that the apportioning of 100% liability by the Trial Court was unsafe. The Respondent herein did not demonstrate that the accident that occurred was wholly the responsibility of the Appellants and neither did he satisfactorily oust the allegation the allegation of his own contribution to it that was put to him during cross-examination.
7. It is not correct to hold that the very nature of a motor vehicle hitting a pedestrian is in of itself a negligent act that necessarily means that the driver of the motor vehicle was at fault. In the case of *Henderson v Henry E Jenkins and Sons*, [1970] AC 232 at 301 it was held that:

“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgment at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails.



But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants.”

8. This position is also well set out in statute. Sections 107, 109, and 112 of the *Evidence Act*, on the burden of proof, were extensively dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*, [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”

9. Based on the evidence presented before it, the Trial Court could not have determined which of the two sides was to blame for the accident, notwithstanding the fact that the Appellants did not give any testimony. The Trial Court erred in not properly situating the evidence of PW2 as having little to no probative value given the documentary gaps exposed during cross-examination. The lack of an independent eye witness to corroborate the testimony of the Respondent was compounded by the failure to adduce a sketch map or any documents from the accident investigators holding the Appellants responsible for the accident while simultaneously absolving the Respondent.
10. In the circumstances, I find that the rule set out by the Court of Appeal in *Hussein Omar Farar v Lento Agencies*, [Nairobi COA Civil Appeal No. 34 of 2005] should apply in the present case and both sides should be found equally to blame for the accident.
11. The Appellants have proposed a quantum of between Kshs.400,000.00 and Kshs.500,000.00 while the Respondent proposes a finding at this appellate stage that maintains the Kshs.1,000,000.00 awarded by the Trial Court. The award of general damages by a trial court is not an exact science. Parties can cite any number of authorities where similar injuries resulted in higher or lower awards. Given this reality, the appellate court's role is limited to analysis of whether a case has been made that the trial court made an award of damages that was too high or too low, or was one that enriches rather than compensates the injured party, or it was one which was not commensurate with the injuries sustained.
12. Having examined the judgment of the Trial Court in light of the testimony tendered before it, in particular the medical reports adduced, and after considering the pleadings and submissions filed at this appellate stage; I take the view that the Trial Court's finding on quantum does not meet the criteria for interference by this Court as an appellate court. The award of Kshs.1,000,000.00 was neither too high nor too low, and it was commensurate with the injuries suffered by the Respondent herein as guided by past cases of similar injuries.
13. On the question of costs, I note that each Party has prayed for the costs of this Appeal. Noting that one of the substantive issues for determination has swung in favour of the Appellants while the other has remained in the Respondent's camp; it would not be fair to condemn either Party to bear the costs of this Appeal.
14. Consequently, the Appeal herein partially succeeds as follows:
- a. The Trial Court's finding of 100% liability against the Appellants is set-aside and substituted with a finding of 50:50 liability between the Appellants and the Respondent;



- b. The Trial Court's finding on the quantum of general damages for pain and suffering in the amount of Kshs.1,000,000.00 is maintained, save for that it shall be subject to a liability of 50:50; and
- c. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Wanjiku Kingori Counsel for the Appellant

Ms. Mumbi h/b Mr. Waiganjo Counsel for the Respondent

Mr. Guyo, Court Assistant

